93-666

No. 93-474

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PASQUALINA SANTORO,

Petitioner,

—v.—

MAHER TERMINALS, INC.,

Respondent/Cross-Petitioner,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS PETITION FOR WRIT OF CERTIORARI

JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
Attorneys for Respondent/ Cross-Petitioner
26 Broadway
New York, New York 10004-1882
(212) 422-6111

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in remanding a claim for Longshore Act workers' compensation benefits to the Administrative Law Judge to decide whether claimant's evidence satisfied the applicable preponderance of the evidence standard after the ALJ held that the evidence on the question of entitlement was "equally probative" and that the issue itself was ". . . still deemed to be debateable . . ."?

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OPINIONS BELOW[1]

This case involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C., Section 901-950 for disability and death of her late husband made by petitioner, Pasqualina Santoro. The administrative hearing resulted in a decision and order awarding benefits of Administrative Law Judge Aaron Silverman dated November 22, 1988, and a decision and order denying reconsideration dated December 15, 1988. The award of benefits was affirmed by the Benefits Review Board, United States Department of Labor, in an unpublished decision dated March 27, 1992. On April 19, 1993, The U.S. Court of Appeals for the Third Circuit reversed the benefits award and remanded the case to the Administrative Law Judge for further consideration. 992 F.2d 1277 (3rd Cir. 1993). Petitions for re-hearing submitted by the widow-claimant and Director of Office of Worker's Compensation Programs were denied by the court of appeals by decision filed June 25, 1993, ____ F.2d ____ (3rd Cir. 1993). On or about September 22, 1993 petitioner, Mrs. Santoro, but not the director, applied to this Court for writ of certiorari, the solicitor general asking for and being given extensions of time to petition until November 10, 1993 pending its decision whether or not to do so in this case. Respondent, which has sought an extension of time to respond to the petition of Mrs. Santoro until 30 days after the time extended to the solicitor general to act or not act on behalf of the director, cross-petitions within 30 days of the Santoro petition on account of the provision of Rule 19.5 of the Supreme Court Rules, that time for cross-petition "shall not be extended". It is not sufficient to rely on the fact that respondent might be able to cross-petition within 30 days of filing of a petition by the solicitor on

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[1] Pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States, the opinions below are not in an Appendix hereto. All references herein to the opinions are to the pages in the original Petition for Certiorari.

behalf of the director, because the solicitor general may decide not to seek a writ.

STATEMENT OF JURISDICTION

Jurisdiction of this Court exists pursuant to Section 28 U.S.C. 1254(1).

RELEVANT STATUTES

5 U.S.C. 556(d) Administrative Procedure Act (in relevant part) provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

33 U.S.C. 919(d) Longshore and Harbor Workers' Compensation Act:

> Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provision of Section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities, vested by this Act, on the date of the enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, in the deputy commissioners with respect to such hearing shall be vested in such hearing examiners.

STATEMENT OF THE CASE

This case concerns the validity of the "true doubt rule" that the department of labor insists applies in Section 919 hearings of disputed claims for benefits under the Longshore and Harbor Workers' Compensation Act, and which was applied in this claim for benefits—where quadriplegia occurred about three weeks after petitioner's decedent's injury during covered employment with Respondent Cross-Petitioner—on account of alleged hastened onset of disability and death resulting from cancer of the spinal cord. That rule provides that when evidence submitted by a claimant and the party opposing an award of benefits is of equal weight, the doubt is resolved in favor of the claimant. See *Mullins Coal Co.* v. *Director OWCP*, 484 U.S. 135, 144 n.12 (1987). The effect of the "true doubt rule" is to put the risk of non-persuasion on the party contesting entitlement. This rule was rejected by the court of appeals which held that the ultimate burden of persuasion, by preponderance of the evidence, is upon the claimant in any case where the Longshore Act Section 920(a) presumption has been rebutted and entitlement does not depend upon the employer's establishing an affirmative defense.

After a hearing before the ALJ, at which the question of cause of disability and death was solely at issue, upon extensive review of the evidence on the "causality" issue, the ALJ, in his November 22, 1988 decision, found: "The issue of causality is still deemed to be debatable, but the doubt is resolved in favor of the claimant" (A-44). Thereafter, cross-petitioner filed a petition to the ALJ for reconsideration, arguing that the rule of doubt was not properly applied by the ALJ in the November 22, 1988 decision. By decision dated December 15, 1988, the ALJ ruled: "It is believed that the equally probative and conflicting evidence was evaluated, discussed and resolved in accordance with the requirements of

the Administrative Procedure Act . . . and [that] further consideration would serve no useful purpose" (A-46).

Cross-Petitioner served a timely petition for review pursuant to 33 U.S.C., Section 921(b)(3) to the Benefits Review Board invoking, among other things, the 5 U.S.C., Section 577(c)(3) requirement that an ALJ's decision include "findings . . . on record". In affirming the ALJ's award of benefits by decision issued March 27, 1992, the board held that the finder of fact had ". . . . determined that [the] employer had introduced evidence sufficient to rebut the presumed causal connection between decedent's condition and his employment and accordingly proceeded to weigh the record evidence regarding causation as a whole" (A-22). But the board—without basis in the ALJ's decision awarding benefits because "equally probative" is not the same as equally persuasive of truth of fact—also held that the ALJ: "[a]fter weighing the evidence and finding it to be in *equipoise* . . . applied the statutory policy that all doubtful questions of fact are to be resolved in favor of the injured employee" (emphasis added) (A-19). It did so despite the fact that the ALJ in his November 22, 1988 decision held that although the testimony of claimant's physician on the issue of medical causation had been "probative", the testimony of cross-petitioner's medical expert, ". . . provided a high level of persuasion"; and that ". . . there is some merit in the employer's position" that the expert medical opinion offered in support of work-relatedness ". . . is a gratuitous 'theory' to put the claimant's case in the best light" (A-40), the latter apparently on account of finding that the testimony on behalf of petitioner of deceased's treating surgeon had been "inconsistent or contradictory" (A-44).

Petitioner, Mrs. Santoro did not appeal from the Benefits Review Board decision and, instead, adopted as a basis of her opposition to respondent cross-petitioner's appeal to the third circuit that: ". . . a true doubt rule had controlled . . . [the ALJ's] . . . ultimate determination [to award benefits] but not his evaluation of the evidence or evidentiary

conclusions" (Brief and Appendix to the Third Circuit for Widow-Respondent, page 25). In sum, petitioner agreed that the ALJ had found that the evidence supporting her claim did *not* preponderate.

In spite of findings by the ALJ in two rulings, and the fact that determination that the evidence on the causation issue was *even* in "equipoise" was made not by the ALJ but the Benefits Review Board, the court of appeals remanded the claim to in order to have the ALJ consider whether the claimant's evidence on the causation issue satisfied the applicable preponderance of the evidence standard. The court of appeals stated at 992 F.2d. 1285:

> It is not clear, however, if the ALJ in this case ever considered whether the claimant's evidence satisfied the preponderance of the evidence standard. It is possible that, upon reaching the point of equipoise, and believing the true doubt rule to be valid, the ALJ halted his inquiry short of deciding whether Mrs. Santoro's evidence preponderated.
>
> Accordingly, the order of the benefits Review Board will be vacated with directions to remand the case to the ALJ to make this determination. If the ALJ again concludes that the evidence is in equipoise, then Maher must prevail.

Cross-Petitioner argues that the order for remand for reconsideration of the evidence ignores the previous two decisions of the ALJ holding, after review of the evidence, that claimant's proof did *not* outweigh its proof on the dispositive issue of causation. The ALJ's holding that the "issue of causality is still deemed to debateable" (A-44) and that the evidence was "equally probative and conflicting" (A-46), according to respondent, precludes as a matter of law a finding upon remand that petitioner's evidence preponderated. Moreover, if the petition of Mrs. Santoro is granted cross-

petitioner will show that the ALJ rejected its proof opposing causality for reason *solely* of the alleged "humanitarian" policy of the Longshore Act; and also that the award of benefits was based upon the ALJ's doubt of the correctness of the opinion negating causality with which petitioner Santoro and respondent *agreed*—that physical trauma did not either cause or aggravate petitioner's decedent's cancer as a result of which he became disabled and died.

REASONS FOR GRANTING THE WRIT

1. The ALJ has twice held that claimant's evidence did not outweigh that of Respondent, Cross-Petitioner and the remand is, therefor, inappropriate.

2. The reason for the ALJ's dou ; and as a result of the "true doubt rule" the basis of his award of benefits, had to do with a claim which was not only made but denied by petitioner—that physical injury *can* cause cancer to grow or accelerate in growth, or change into a new and more malignant form. Nonetheless, it was for reason that *possibly* existed otherwise that ALJ concluded on the basis of "doubt" that injury might have hastened onset of disability and death, with the further result that respondent was found liable for Longshore Act benefits. To allow the ALJ to award benefits on some other basis after so determining appears in at least some conflict with this Court's holding in *U.S. Industries/Federal Sheet Metals Co., Inc. v. Director, OWCP*, 455 U.S. 608 (1982). Cross-Petitioner also asks that this Court exercise its power of supervision in order to abolish all possibility that an award of benefits might eventually be ordered despite the ALJ's two holdings and petitioner's agreement that the doubt rule was employed—not to resolve disputed particular questions of fact—but in order to award benefits because the proofs were *not better than in* "equipoise". Acceptance of an award of benefits in such circumstances would constitute a far departure from the accepted and usual course of judicial proceedings.

CONCLUSION

In the event Mrs. Santoro's petition is granted Cross-Petitioner requests that the Supreme Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit reversing the order of remand to the ALJ and dismissing petitioner's claim for workers' compensation benefits.

DATED: New York, New York
October 22, 1993

Respectfully submitted,

JOSEPH T. STEARNS
Counsel of Record
KENNY & STEARNS
Attorneys for Respondent-Cross-Petitioner
26 Broadway
New York, New York 10004-1882
(212) 422-6111

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MAHER TERMINALS, INC., CROSS-PETITIONER

v.

PASQUALINO SANTORO, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the court of appeals abused its discretion by remanding this case to an administrative law judge for further proceedings, rather than directing entry of judgment for cross-petitioner.

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the court of appeals (93-474 Pet. App. A1-A16[2]) is reported at 992 F.2d 1277. The decision of the Benefits Review Board (93-474 Pet. App. A17-A25) is unreported, as are the decisions of the administrative law judge (93-474 Pet. App. A26-A45, A46).

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[1] In addition to the parties listed in the caption, the Director of the Office of Workers' Compensation Programs of the Department of Labor was a respondent in the court of appeals.

[2] "93-474 Pet. App." refers to the appendix to the petition for a writ of certiorari in *Santoro* v. *Maher Terminals, Inc.*, No. 93-474, which seeks review of the same decision of the court of appeals.

JURISDICTION

The court of appeals entered its judgment on April 19, 1993, and denied petitions for rehearing on June 25, 1993. The claimant, Pasqualina Santoro, filed a petition for a writ of certiorari on September 23, 1993 (No. 93-474), and the employer filed this cross-petition on October 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The primary issue in this case is the validity of a principle of adjudication—the "true doubt" rule—that the Department of Labor has for many years applied in resolving benefit claims under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, and the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.* That rule provides that when evidence submitted by the claimant and by the party opposing an award of benefits is of equal weight, the remaining doubt is resolved in favor of the claimant. See, *e.g.*, *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs (OWCP)*, 484 U.S. 135, 144 n.12 (1987); 93-474 Pet. App. A2.

In this case, which arose under the LHWCA, an administrative law judge (ALJ) awarded benefits to the claimant after invoking the "true doubt" rule. 93-474 Pet. App. A39, A44; see also *id.* at A46 (order denying reconsideration). The Benefits Review Board affirmed. *Id.* at A17-A24. The court of appeals vacated the award, holding that application of the "true doubt" rule is inconsistent with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), which the court construed to require a benefits claimant to bear "the ultimate burden of persuasion by a

preponderance of the evidence." 93-474 Pet. App. A14, A15-A16. Because it was not clear to the court whether the ALJ, "upon reaching the point of equipoise, and believing the true doubt rule to be valid, * * * [had] halted his inquiry short of deciding whether Mrs. Santoro's evidence preponderated," the court directed the Board to remand the case for the ALJ to make that determination. *Id.* at A16.

The claimant, Pasqualina Santoro, filed a petition for a writ of certiorari, No. 93-474, seeking review of the court of appeals' invalidation of the "true doubt" rule. The Solicitor General, on behalf of the Director, OWCP, has also filed a petition for a writ of certiorari (No. 93-744) seeking review of the judgments of the court of appeals in this case and in *Greenwich Collieries* v. *Director, OWCP*, 990 F.2d 730 (3d Cir. 1993), in which the court of appeals held that the "true doubt" rule is inconsistent with this Court's decision in *Mullins Coal* and with one of the Department's regulations implementing the BLBA (20 C.F.R. 718.403). In this cross-petition, the employer argues that the court of appeals erred by remanding the case to the ALJ, instead of reversing the award of benefits outright.

ARGUMENT

"[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982); see also *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974); *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986). Moreover, on judicial review of agency action, once a court identi-

fies legal error affecting an agency's factual findings, remand to the agency for further proceedings is not only squarely within the court's remedial powers, but usually the preferred course of action, because it enables the agency to resolve in the first instance matters that Congress has committed to the agency. See *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373-374 (1939),

The court of appeals applied those principles here. The court determined that the ALJ had erroneously relied on the "true doubt" rule in weighing the evidence concerning the benefits claim, and it remanded because it was uncertain which conclusion the ALJ would have reached without resort to the "true doubt" rule. 93-474 Pet. App. A1-A14. The cross-petition relies on what it characterizes (Cross-Pet. 6) as "the ALJ's two holdings * * * that the doubt rule was employed * * * to award benefits because the proofs were *not better than in* 'equipoise.'" As the court of appeals pointed out (93-474 Pet. App. A16), however, it is also possible that the ALJ determined only that the proofs were *at least* in equipoise—that is, that "upon reaching the point of equipoise, and believing the true doubt rule to be valid, the ALJ halted his inquiry short of deciding whether Mrs. Santoro's evidence preponderated." The court of appeals' decision to remand the case to the ALJ to resolve that ambiguity was well within its discretion, affects only the parties to this case, and does not merit review by this Court.[3]

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[3] Contrary to cross-petitioner's contention (Cross-Pet. 6), the court of appeals' decision to remand the case does not conflict with the decision in *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608 (1982). That case involved a remand to consider "[a] claim that was not made,"

For the foregoing reasons, the cross-petition should be denied. In the alternative, the Court may wish to hold the cross-petition in this case pending the decision of No. 93-474 on the merits, and to dispose of the cross-petition in light of that decision.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

STEVEN J. MANDEL
Deputy Associate Solicitor

EDWARD D. SIEGER
Senior Appellate Attorney

NOVEMBER 1993

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and that even if made would not have satisfied the statute's threshold requirement that a claimed injury have arisen "in the course of employment." *Id.* at 616. There is no dispute in this case that Mrs. Santoro's claim was properly made and allowable, provided that the ALJ agreed with her factual contentions after applying the appropriate standard of proof. Cross-petitioner also argues (Cross-Pet. 5) that the claimant "agreed [in the court of appeals] that the ALJ had found that the evidence supporting her claim did *not* preponderate." The claimant appears to have argued below, however, both that the ALJ applied the "true doubt" rule, and that the ALJ found the claimant's evidence more persuasive than cross-petitioner's. Resp. C.A. Br. 15-16, 25.